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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS, JR., *et al.*,
Petitioners,
v.
CHARLES ODEGAARD, President
of the University of Washington, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE, AMICUS CURIAE

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INTEREST OF THE AMICUS

This case has vital importance for all colleges and universities throughout the United States. Harvard University, on whose behalf this brief is filed, is the oldest and one of the largest privately-endowed institutions of higher learning in the United States.

1. The narrowest question for decision is whether the University of Washington Law School, a State institution,

violated Petitioner DeFunis Jr.'s rights under the Equal Protection Clause by counting membership in a racial or ethnic minority as a relevant factor in admitting minority students to the first-year class. Affirmance or reversal may therefore depend upon the exact practices followed by the respondent Admissions Committee, and possibly upon other circumstances peculiar to the particular case.

The implications of any reversal would be broader, however, for higher education generally and for Harvard University in particular. Many of the constitutional propositions submitted by petitioners or *amici* as grounds for reversal would condemn a variety of admissions policies and practices. The application of the Equal Protection Clause to admissions to institutions of higher learning has been considered previously by this Court only in cases of invidious segregation connoting white supremacy. However narrow the final ruling, the case cannot be decided wisely and a constructive opinion cannot be written upon so novel yet far-reaching a question without a broad view of the educational context, comprehending not only other graduate and professional schools but especially undergraduate education.

We believe that relating Harvard's varied experience and resulting philosophy to the legal issues will help to provide the necessary perspective. We emphasize undergraduate education because no other brief seems likely to address the issue in these terms. Harvard's long experience in this area highlights the dangers of substituting an iron rule of law for the discretion of academic authorities to make a conscious selection of qualified students from the greatest variety of cultural, social and economic backgrounds in order to improve the educational experience of the whole student body.

2. Although the case may decide directly only the constitutional obligations of State institutions of higher education, its effect is bound to be broader if petitioners' contentions are sustained. Whether Harvard or another privately-endowed institution is constitutionally bound will depend upon "sifting facts and weighing circumstances" to determine the extent of government involvement in the activities of the particular institution (*Burton* v. *Wilmington Pkg. Auth.*, 365 U.S. 715, 722 (1961)). See *Powe* v. *Miles*, 407 F.2d 73 (2d Cir. 1968); *Pennsylvania* v. *Brown*, 392 F.2d 120 (3d Cir. 1968), cert. den. 391 U.S. 921 (1968); *Robinson* v. *Davis*, 447 F.2d 753 (4th Cir. 1971), cert. den. 405 U.S. 979 (1972); *Blackburn* v. *Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971); *Browns* v. *Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Grossner* v. *Trustees of Columbia Univ.*, 287 F. Supp. 535, 546-549 (S.D.N.Y. 1968). Compare *Guillory* v. *Administrators of Tulane Univ.*, 203 F. Supp. 855 (E.D.La. 1962) with same case on remand, 212 F. Supp. 674 (E.D.La. 1962), after upholding of vacating of temporary injunction, 306 F.2d 489 (5th Cir. 1962).

In addition, Harvard and many other privately-endowed colleges and universities receive government grants and are parties to government contracts obligating them not to exclude any person "on the ground of race, color or national origin" or to subject him or her "to discrimination under any program or activity receiving Federal financial assistance" (42 U.S.C. §2000d). The ruling in the instant case would probably govern the interpretation of these statutory and contractual obligations.

Whether legally binding or not, a decision sustaining petitioners' submission would have powerful influence throughout the world of higher education. The governing authorities of privately-endowed colleges and universities,

even in the face of their own prior educational experience and the advice of faculty and directors of admissions, would have to think long and hard before continuing to sanction admissions policies which this Court had held to be so unjustly discriminatory as to violate the Equal Protection Clause in the case of a State university.

The views expressed in this brief are those of the President and Fellows of Harvard College, a corporation more commonly known as Harvard University. They should not be understood to express the individual or collective opinions of any faculty members.

Counsel for all parties have given written consent to the filing of this brief, as shown by letters on file with the Clerk.

QUESTIONS PRESENTED

1. Whether the Equal Protection Clause deprives the educational officers of a State University, charged with selecting a class of limited size from a larger number of qualified applicants, of discretion to give favorable weight to race or color among other indicia of diverse experience and interests as a means of improving the education of all students.

2. Whether the Equal Protection Clause deprives the educational authorities of a State University, charged with selecting a class of limited size from a larger number of qualified applicants, of discretion to give favorable weight to race or color, among other criteria, as a means of opening up educational and career opportunities, broadening a profession and facilitating the provision of professional services, to generally-disadvantaged minority groups.

SUMMARY OF ARGUMENT

I

When the applicants for admission to an entering class greatly outnumber the available places, the admissions officers must ask not only (1) does the applicant have the qualifications necessary for admission if space is available, but also (2) if qualified, should he or she be selected in preference to the other qualified candidates who must be rejected. The first question can usually be answered by reference to more-or-less objective measures of scholastic promise and accomplishment. The same or different or partially-overlapping criteria may be set up for the process of selection.

The choice of criteria for selection depends upon educational judgments concerning the quality of education the institution wishes to offer. A given institution might wish simply to select students at the highest intellectual capacity, measured by scholastic records and potential. Another institution might wish to give substantial weight to superior intellectual qualifications in filling all the places in the class — say 40 percent weight — but conclude that an equally marked superiority in other important qualities should be enough to offset them. At Harvard College experience has convinced admission authorities that if promise of high scholarship were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and the quality of the educational experience offered to all students would suffer.

The Equal Protection Clause does not impose an iron rule of "color-blindness." Prior opinions of this Court recognize that assigning minority students to a particular school in the same proportion to its student body as the minority bears to the whole population "as an educational

policy" is "within the broad discretionary powers of school authorities" (*Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971)). The Equal Protection Clause looks to equal treatment of the members of the identifiable groups composing society, not to disregard of the special characteristics of their members. An admissions policy that purposefully *excludes* members of a disadvantaged minority, segregates them or limits their number, asserts their inferiority to the predominant groups and therefore constitutes "hostile" or "invidious," and unconstitutional discrimination. An admission policy that *includes* members of disadvantaged minorities in order to improve the education offered all students, carries no "hostile" or "invidious" implication. When an inclusive policy is conscientiously followed, race or color is a helpful but not invariably reliable indicator of special social, economic or cultural background and experience likely to carry their own varieties of talent, outlook and interests. The fact that race or color is only one of many highly personal characteristics used as a basis for judgment in preferring some qualified applicants over others in the inescapable process of selection helps to minimize any danger that such attention will be or be seen as "invidious."

Because giving attention to disadvantaged minority status in including minorities as a means of obtaining the diversity which raises the quality of education is not "hostile" or "invidious," it can be justified without "compelling purposes." Obviously, the distinctions thus drawn are not arbitrary or capricious. The objective of improving education for all students is permissible and non-discriminatory. The means is reasonably adapted to the objective. Should it be held that any notice of race requires a "compelling" justification, then we submit that seriously seeking to improve the non-discriminatory educational opportunities afforded all students is such a purpose.

II

Definition of community needs and choice of emphasis in filling them is a central aspect of educational policy-making at any institution of higher learning. An institution's choice of the criteria to use in the selection of an entering class from a larger number of qualified applicants will be deeply influenced by its choice of ultimate objectives. In recent years many institutions of higher education have determined that their objectives should include removing the special obstacles facing disadvantaged minority groups in access to higher education, business and professional opportunities, and professional services — obstacles which are deeply-ingrained consequences of the hostile public and private discrimination pervading the social structure. Giving favorable weight to minority status in selecting qualified students for admission is an important method of reducing these disadvantages.

Neither the pursuit of this objective nor the means adopted is beyond the scope of educational policy-making discretion under the Equal Protection Clause. The Equal Protection Clause does not prohibit all racially-conscious government activity, but only that which is "hostile" or "invidious" towards minorities without compelling justification; or which occurs in relation to a "fundamental right" without compelling justification; or which falls under the general constitutional ban against arbitrary or capricious classification. Giving an advantage in law school admissions in order to reduce the disadvantages suffered by members of minority groups long subject to pervasive discrimination, is neither "hostile" nor "invidious." Legal education is not a "fundamental right." Nor is counting membership in a disadvantaged minority arbitrary or capricious. Offsetting the disadvantages is a permissible

object of State policy. Giving favorable weight to membership in a disadvantaged minority in the process of admissions is so plainly related to reducing the disadvantages which black, chicanos, American Indians and other minorities suffer in access to higher education and career opportunities and in securing legal services as to be not only reasonable but to satisfy the "compelling interest" test.

Affirmance would establish the rule only where the inequalities of opportunity are plain beyond dispute and only in situations in which giving weight to minority status does not increase the ratio of minority students to all students significantly beyond the ratio of minority groups to the whole population from which the entering class is drawn. Nor does the case require decision upon the constitutionality of fixing specific racial, ethnic, linguistic or national quotas.

ARGUMENT

Introductory

At many institutions of higher learning as at the University of Washington Law School the volume of applications for admission so far exceeds the available places as to require the development of policies and practices for selecting some students for admission out of a much larger number who are fully qualified in the sense that they could do good work at the institution if there were room for them. Many of these colleges and graduate schools, again like the University of Washington, take some kind of cognizance of membership in a generally-disadvantaged minority group as a factor favoring selection. Here uniformity ends. Admissions policies and practices differ widely in their treatment of minorities. The criteria of selection, ur[1] .s left to chance, are related to the educational philosophy of the

particular institution, either its internal aims with respect to the character of education to be offered or its external objectives in terms of the functions it wishes to perform for society. We seek primarily to put the legal propositions advanced in support of petitioners into this broader perspective so that the Court may have full understanding of the various educational consequences.

Cognizance may be taken of minority status solely as a means of achieving the completely non-discriminatory objective of improving the educational opportunities of all students. Membership in a minority race or other disadvantaged group often imports a special background, experience and interests, so that attention to race as one of many elements in the process of selection is a step in providing diversity. As we show in Point I, experience over a long period at Harvard College has convinced the admissions officers that increasing the diversity of a student body of lively, intelligent and interesting students greatly improves the quality of their education. In the second half of Point I we state our reasons for concluding that the Equal Protection Clause does not bar giving favorable consideration to minority status as one of many factors considered in promoting diversity within the student body as a means of improving the non-discriminatory educational opportunities of all students.

Other admissions policies give favorable weight to minority status wholly or partly for the purpose of implementing the institution's choice of ultimate social objectives. In Point II we illustrate this theme but emphasize the relationship between law school admissions policies giving favorable consideration to minority groups and such broader educational objectives as opening up educational and professional opportunities which the prejudices pervading society previously closed to blacks, chicanos, Ameri-

can Indians and sometimes other minority groups. In the second part of Point II we turn again to the applicable constitutional principles and show that the Equal Protection Clause does not deny State educational authorities discretion to adopt and pursue such important objectives.

The case does not involve fixed numerical or percentage quotas. For reasons explained at pp. 42-43, 50-51, *infra*, we think that practice distinguishable and suggest that the question of fixed quotas be reserved.

I

THE ADMISSIONS OFFICERS OF A STATE UNIVERSITY MAY GIVE FAVORABLE WEIGHT TO MEMBERSHIP IN A DISADVANTAGED MINORITY GROUP AS A MEANS OF IMPROVING THE EDUCATION OF ALL STUDENTS

A. The Conscious Selection of Some Qualified Members of Minority Groups for Inclusion in a Student Body of Limited Size Improves the Educational Opportunities of All the Students.

At an institution with many more applicants than available places the admissions officers must be prepared to answer two questions:

(1) How shall they determine which applicants are "qualified" in the sense that they have sufficient ability to benefit substantially from the proposed course of study at that institution and to bring a level of intellectual capacity to the classes which does not impede other students? The question in any given instance is, "will we accept this applicant if there is room?"

(2) By what criteria shall they select from among a large number of fully-qualified applicants the much smaller number whom the institution can accommodate?

We do not imply that in practice all applications are first put through the step of winnowing out the unqualified, and that the qualified are thereafter subjected to the step of selection. In practice, some applicants will immediately appear to be qualified in the first sense and to present an outstanding case for selection in the second sense. In other instances, especially where scholarly attainment is one of the major criteria for selection, it may quickly appear that although an applicant is "qualified" in the first sense, his case for actual admission, in terms of the criteria established for selection, is far too weak to merit further consideration.

The distinction is important nonetheless, because the criteria used for determining whether an applicant is qualified must not be confused with the criteria for actual selection. At the first stage the criteria are chiefly intellectual: intelligence and aptitude tests, past academic record and previous education. Health and motivation may be minor elements. Membership in a racial or disadvantaged minority group is relevant, if at all, only in adjusting test scores and other predictors of academic success in order to compensate for correctible deficiencies in the previous experience or education of particular students. *A priori* the qualities which admissions officers at a particular institution value in making actual selections may be the same as those to which they look in determining admissibility, but they may be different or they may be overlapping. The various predictors of academic success measured by grades on examinations and assigned papers may be the best measure in judging whether an applicant possesses the school's minimum qualifications, but neither logic nor law nor sound educational policy commands exclusive use of, or even any reliance upon, the predictors in making selections from among the qualified applicants at the second stage of ad-

missions. Most institutions treat sufficiently great promise of academic success as ground for actual admission, using virtually the same predictors as are used in determining minimum qualification, but below that level such predictions may be treated as irrelevant, or the greater academic promise of one applicant may be judged less important than some quite different asset of another. The proportion of students selected because of academic promise alone differs from institution to institution. Harvard College selects about 150 students on the basis of extraordinary intellectual potential for an entering class of 1,100.

The failure to grasp this essential distinction is the source of petitioners' repeated but misleading assertion that minority applicants were preferred despite DeFunis Jr.'s superior qualifications. Petitioners' Opening Brief, pp. 2, 7. The assertion assumes that the predictors used in measuring admissibility are the only proper criteria in the process of selection. The assumption is contrary to policy and practice both at the University of Washington Law School and elsewhere.

At the stage of selection, the educational and admissions policies of any institution of higher learning should be interrelated. The criteria of selection determine the composition of the student body, which in turn seriously affects the kind and quality of educational opportunities offered to all students. Policies fixing the criteria should therefore be based upon academic decisions concerning the kinds and quality of educational opportunities the institution wishes to offer.

A given institution might wish simply to select students of the highest intellectual capacity, measured by scholastic records and potential, in the belief that it should be exclu-

sively concerned with challenging the intellect and increasing the formal learning of the student body, and with encouraging the students thus to challenge each other in these areas. Exclusive reliance on measured achievement might also be thought to introduce the highest form of equality and productive stimulus.

Another institution might conclude that education should be conceived more broadly and that, given minimum assurance of scholastic competence, all students are best served by selecting from the qualified applicants the entering class whose members have the most diverse social, economic and cultural backgrounds and the widest variety of talents and interests. In this view, diversity is a stimulus to the development of every student's personality and understanding as well as a preparation for the society in which he will live. Securing these non-discriminatory, educational objectives for the whole student body dictates evaluating a wide variety of personal characteristics, many of them utterly irrelevant in measuring ability to meet academic standards.

Still a third institution might wish to give substantial weight — say 40 percent — to superior intellectual qualifications in filling all the places in a class, but conclude that an equally marked superiority in other qualities judged to be important should be enough to offset them.

In the first case, neither race nor minority status would be relevant. In the second and third cases, membership in a minority race or other special ethnic group would be a relevant and often highly material consideration because of its significance in forming an entering class whose members will have the diverse characteristics, attachments and experience making them markedly stimulating to each other. Race, color or ethnic origin, like economic or cultural back-

ground, is one of the many characteristics that a student presents to his classmates as an individual does to the world--a characteristic which should carry neither invidious distinction nor arbitrary preference, which some treat as always and utterly irrelevant but which others may perceive as encouraging pride and a sense of identification in cultural origins and diversity without hostile connotation. Race, color and ethnic origin also tend to identify forms of special experience, social and cultural background, outlook, interests and attachments which make important contributions to a student body. This is especially true at any institution which has been predominantly white for a long period.

The foregoing general observations concerning the relationship between educational and admissions policy are drawn largely from experience at a number of Harvard schools, especially the undergraduate college. For the past 25 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 25 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence

and that the quality of the educational experience offered to all students would suffer. *Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid,* pp. 20 et seq. (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty — perhaps 150 or so out of an entering class of over 1,100 — the Committee seeks —

> variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College] . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.* (Dean of Admissions Fred L. Glimp, *Final Report to the Faculty of Arts and Sciences,* 65 Official Register of Harvard University No. 25, 93, 104-105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Ten or fifteen or twenty years ago, however, diversity meant students from California, New York and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority

representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogeneous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is

aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and *vice versa*. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.

The explicit emphasis put on diversity at Harvard College is greater than in other parts of Harvard University. The range of relevant diversity is probably greater in

undergraduate than graduate education; musical talent, for example, would surely be given greater weight by the Admissions Committee of Harvard College than by the committees at the Medical School or Law School. The level of intellectual promise, coupled with academic preparation, is so uniformly superior among a large number of applicants and refined differences have such relatively small importance for undergraduate education as to furnish scant basis for selection. Emphasizing a wide range of diversity, moreover, almost automatically ensures that Harvard College will help to open educational and career opportunities to young men — and through Radcliffe College, young women — from all parts of society and sections of the country.

Though the range of significant diversities may be less at some graduate or professional schools and relatively less weight may be placed upon them, all Harvard faculties recognize the educational importance of diversity of social and economic background, experience and resulting outlook in the class and seminar rooms, and in less formal discussions in the dormitories and commons. The point was well-stated in the brief filed by The Committee of Law Teachers Against Segregation in Legal Education in *Sweatt* v. *Painter*, 339 U.S. 629 (1950), as printed at 34 Minn. L. Rev. 289, 325 (1950):

> The lawyer, to meet the responsibilities of his profession, must have a vital sense of the culture of the community in which he lives and works. "Lawyers are perpetually engaged in trying to anticipate, prevent, mediate, settle or win human disagreements involving alleged rights recognized at law. Their thinking, planning and action are framed and limited by what they understand to be the prevailing principles and doctrines of law . . . " The knowledge required for these tasks can in part be obtained from books; but a major share must come from intimate knowledge of the ways of

thought of the community. "He (the lawyer) is literally lost unless he can sense the drives, interests (and weaknesses) of those with whom he deals — whether as witnesses, negotiators, judges, clients, or opponents." (footnotes omitted)

In sum, diversity within the student body is often an intermediate goal of educational policy because diversity surely may — and most experienced educators believe that it does — improve the education of all students. A hard-and-fast rule forbidding an institution to give favorable consideration to membership in a minority race or other minority group in selecting an entering class from the qualified applicants would severely constrict the freedom of academic authorities to improve the non-discriminatory educational opportunities for the whole student body.

B. The Equal Protection Clause Does Not Deny to Educational Authorities Discretion Consciously to Select Some Qualified Members of Minority Groups for a Student Body of Limited Size as a Means of Improving the Educational Opportunities of All the Students.

This Court has already affirmed in broader terms than we need advocate the right of school authorities to take account of race in forming and effectuating non-discriminatory educational policies. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971) the Chief Justice wrote for the Court —

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities. . . .

The efforts of counsel to distinguish the *Charlotte-Mecklenburg* case upon the ground that "[n]o student has a Constitutional right superior to any other student to attend a particular school in the system" mistake the situation (Brief of American Jewish Congress as *Amicus Curiae*, at 16). There is no greater "constitutional right" to a law school education than there is to assignment to a particular school in a single school system. In each case the student has a very real and important interest in his or her educational objective. The disappointments and adverse consequences of assignment to be bussed to a school out of one's own neighborhood may be as serious as those of denial of admission to a particular law school, for both parents and child. In some instances, denial of admission to a State university law school may, in conjunction with other individual circumstances, block access to legal education. In either event, the question is not one of relative hardship. If attention to race or color were barred under the Equal Protection Clause by any hard-and-fast rule, it would be as unconstitutional in the one case as the other. See pp. 47-49, *infra*.

Both State and lower federal court decisions also support the discretion of school districts to make school assignments with an eye to race in the interest of fulfilling the educational purpose of introducing racial pluralism into schools where segregation *de facto* formerly prevailed. *Offerman* v. *Nitkowski*, 378 F.2d 22 (2d Cir. 1967); *School Committee of Boston* v. *Board of Education*, 352 Mass. 693, 227 N.E. 2d 729 (1967), appeal dismissed 389 U.S. 572 (1968); *Tometz* v. *Board of Education*, 39 Ill. 2d 593, 237 N.E. 2d 498 (1968); *State ex rel. Citizens Against Mandatory Bussing* v. *Brooks*, 80 Wash. 2d 121, 492 P. 2d 536 (1972); *Springfield School Committee* v. *Barksdale*, 348 F. 2d 261, 266 (1st Cir. 1965); *Balaban* v. *Rubin*, 14 N.Y. 2d

193, 250 N.Y.S. 2d 281, 199 N.E. 2d 375 (1964), cert. den. 379 U.S. 881 (1964). School committees have been allowed to look to race in making faculty assignments more equitable in racial distribution. *Kemp* v. *Beasley*, 389 F. 2d 178, 187-189 (8th Cir. 1968); *Porcelli* v. *Titus*, 431 F. 2d 1254 (3d Cir. 1970), cert. den. 402 U.S. 944 (1971).

Similarly, where there has been a denial of equal employment opportunities, State agencies have been required to give favorable consideration to minority races in filling jobs that come open. *Carter* v. *Gallagher*, 452 F.2d 315, 327-331 (8th Cir. 1972), cert. den. 406 U.S. 950 (1972); *Castro* v. *Beecher*, 459 F.2d 725, 736-737 (1st Cir. 1972).[1] State agencies have been required to construct a specified high proportion of public housing units in areas of a particular racial composition. *Gautreaux* v. *Chicago Housing Authority*, 304 F. Supp. 736 (N.D. Ill. 1969), on appeal from a subsequent order, 436 F.2d 306 (7th Cir. 1971), application for stay denied, 401 U.S. 953 (1971). To point to the prior violations of the Equal Protection Clause in order to differentiate these cases is to draw a distinction without a difference. The law is not so foolish as to order a State to remedy past violations by pursuing practices that would be unconstitutional when independently considered.

Turning from precedent to principle, three simple truths delineate the only arguable issue:

(i) The Equal Protection Clause does not forbid pursuit of a selective admissions policy at a State institution of higher education. The state is not constitutionally obliged to provide higher education for those who appear to lack the intellectual and academic qualifications necessary to

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[1] See also *United States* v. *Local Union No. 212*, 472 F. 2d 634 (6th Cir. 1973), involving remedies for a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e.

benefit. Nor is a State required to find the resources to provide places in its system of higher education for everyone who does have intellectual and academic qualifications giving promise of benefit. When the number of applicants qualified to benefit from the particular course of instruction is greater than the number of places available, the institution may, because it must, select some qualified applicants and turn away others.

(ii) The Equal Protection Clause neither requires nor invites the judiciary to prescribe the standard of selection to be used by educators where the limited number of places forces them to select some qualified applicants for actual admission but to deny others despite the adequacy of their qualifications. Standards of selection that would not be constitutionally permissible in other contexts are acceptable in admissions to colleges and universities, both because the individual characteristics that may be educationally relevant are numerous and because, despite disappointments and hardships, selections must be made.[2] Nor is there anything in law, logic or educational policy that dictates use of the same standards in determining whether candidates are qualified for admission and in making actual selections. See pp. 11-14, *supra*. Petitioners' and *amici's* repeated reference to DeFunis's superior qualifications falsely as-

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[2] The necessity of selection distinguishes cases involving classification for the purpose of general regulatory legislation, *e.g.*, *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967). Regulatory and criminal laws can apply equally to the whole community or to all persons engaged in defined activities. Given existing limitations of space, budget and qualified instructors, often a particular course of higher education cannot be offered to all who desire it, or even to all who are qualified to benefit. The variety of educationally relevant criteria is so great and the proper choice of criteria is so debatable that failure to adhere to a few simple and generally-accepted tests does not furnish proof of discrimination as in employment cases, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

sume some set of qualifications for actual selection which is neither established by law nor used at the University of Washington Law School.

A number of briefs urging reversal explicitly or implicitly start from the premise that "intellectual competency and capacity," proved chiefly by academic performance and intelligence or aptitude tests, is the only permissible standard for selecting students for places in a law school unable to accept all its qualified applicants. See, *e.g.*, Brief of Advocate Society et al. as Amici Curiae, at 20; Brief of Anti-Defamation League as Amicus Curiae, at 24. The use of intellectual merit as an almost exclusive standard has had enormous value in enhancing the quality of teaching and scholarship. It has been equally important in eliminating or reducing some forms of prejudice, first in higher education and then in the professions. It is surely plausible and may even be right to say that, in admissions to some kinds of graduate schools and other educational decisions, intellectual capacity and performance are still the ideal criteria even though they do less alone than when tempered with other criteria to meet the problems of racial and ethnic inequalities in access to educational and professional opportunities. Such questions are constantly under debate in higher education. That is where the debate belongs, for the issues are matters of educational policy not constitutional law. The Fourteenth Amendment does not command the use of "intellectual competency and capacity" as the sole basis of selection for admission to every institution in whose activities a State is significantly involved. Here as elsewhere in the realm of ideas, variety and experimentation are the keys to greater understanding.

The Equal Protection Clause leaves the States "a wide scope of discretion" (*McGowan* v. *Maryland*, 366 U.S. 420,

425 (1961)) especially in the realm of education. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Chief Justice spoke of "the broad discretionary powers of school authorities" in matters of "educational policy." 402 U.S. at 16. Cf. *Healey* v. *James*, 408 U.S. 169, 180 (1972); *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 507 (1969). In *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 42 (1973), Justice Powell referred to the "persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with informed judgments made at the state and local levels." Educational programs and the admissions policies and practices that affect them lie in the realm of ideas, where the highest importance attaches to academic freedom for both State and privately-endowed institutions. As Justice Brennan observed in *Keyishan* v. *Board of Regents*, 385 U.S. 589, 603 (1967) —

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[2a]

[2a] A prime reason for this guaranty of educational liberty was stated by Justice Douglas, dissenting in *Board of Regents* v. *Roth*, 408 U.S. 564, 581-582 (1972), quoting from an earlier concurring opinion of Justice Frankfurter in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 261-262 (1957):

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good — if understanding be an essential need of society — inquiries into these

(iii) It follows — putting such qualities as race or ethnic origin temporarily aside — that the Fourteenth Amendment generally permits an institution to make an applicant's probable contribution to the diversity of the student body the primary standard of selection once there is promise of satisfactory academic performance. The degree of diversity provided is directly related to the quality of educational opportunities offered, and many authorities believe it essential to an optimum program. See pp. 12-17, *supra*. Given this relationship and the necessity of choice, comparing candidates in terms of talents, outlook, experience, social, economic and cultural background and other like qualifications is within the discretion available to educational authorities under the Fourteenth Amendment even though distinctions made upon such grounds would be unconstitutional in such areas as taxation and criminal law. The constitutionality of such an approach to law school admissions was implicitly affirmed in *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950), where this Court observed —

> . . . although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

The immediate issue thus boils down to a very narrow question. Given the necessity of preferring some qualified applicants over others and the permissibility of refined

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problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

comparisons on the basis of very personal characteristics, does the Fourteenth Amendment nevertheless require admissions officers to blind themselves to what all the world knows: that the presence of members of minority races is one of the most valuable sources of diversity in any community whether large or small, general or specialized?

Plainly, the words of the Constitution do not decree this form of color-blindness. Nor should its majestic generalities be so interpreted. The policy of the Equal Protection Clause looks to equal treatment of the members of the identifiable groups composing society, not to the elimination or disregard of the special characteristics of their members. In urging that admissions committees need not be blind to the opportunities for increasing diversity among the students in a class and thus improving their education *by including students from racial and ethnic minorities*, we do not suggest that race and ethnic origin may always be used as a basis of selection. To use race, color or ethnic origin *to exclude* members of an insular minority, impose a restrictive quota or enforce segregation is patently unconstitutional. *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Meredith* v. *Fair*, 305 F.2d 343 (5th Cir. 1962), cert. den. 371 U.S. 828 (1962); cf. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

It is argued that since a felt educational need for homogeneity within a classroom will not justify differentiations based upon race or color, they cannot be justified by a desire for diversity, because the one has no sounder educational claim than the other. The argument can be answered in educational terms, but the central fallacy is the assumption that the academic exclusion or segregation of minorities has the same psychological, sociological and political effects as their inclusion. In any society, the effects of

including any defined group in opportunities and benefits will be different from the consequences of their segregation or exclusion. Professor Paul A. Freund puts a simple but revealing example:

> Compare a trust fund donated to a university, the income to be used for the education of the descendants of John Hancock, and an unrelated fund for the education of anyone except those descendants. It would not be surprising if the governing board of the university felt differently about the two preferences, and judges might be animated by the same sense of justice in applying the constitutional guarantee of equal protection of the laws. (P. Freund, On Law and Justice 47 (Cambridge, 1968)).

In the United States, as a result of the long years of slavery and Jim Crow policies any admissions policy that denies admission to black students, segregates them or limits their number not only carries the vice of exclusion but asserts the supremacy of the white race and the inferiority of others; and for that reason it constitutes "hostile" or "invidious" discrimination. On the other hand, there is no danger of "invidious" or "hostile" implication, whether in purpose or effect, when a predominantly white institution counts membership in disadvantaged racial or other minority groups as a factor favoring selection for admission from otherwise qualified candidates.

The absence of "hostile" or "invidious" discrimination results from a number of factors. A policy of promoting variety by including members of minority groups along with applicants of other diverse backgrounds and talents gives relatively little weight to minority status as such. To be sure, race, color or ethnic origin is one of the characteristics a student presents to his fellows as a man does to the world, and among those of limited experience a difference in these respects may arouse irrational prejudices that it is a function of education to dissipate. The real signifi-

cance of minority status for admissions officers concerned with providing a richly diverse student body, however, is that it is a useful although not invariably reliable indicator of a kind of special social, economic or cultural background for which they are looking because it is likely to carry its own important varieties of experience, perception, talent, outlook and interests.

In addition, minority status is only one of many personal characteristics considered when the admissions officers' aim is to secure diversity among the students selected for admission. This context helps further to minimize any danger of invidious connotation. Preferring a black applicant from an urban area over a middle-class, suburban white applicant comes to have no different connotation from preferring a poet to a chemist, an Alaskan to a Bostonian, or a chicano raised in migrant labor camps to an applicant of Puerto Rican birth raised in New York, in each case because the class lacked students in one category and had ample in the other.

Giving favorable attention to minority status in opening the doors to higher education to minority groups has the incidental effect of partially offsetting the severe inequalities in education and educational opportunities from which generally-disadvantaged minorities currently suffer. This point need not be advanced, however, to sustain the use of minority status as a factor which favors the admission of qualified minority applicants but is to be weighed among other indicia of applicants' diversely stimulating, individual characteristics in an effort to compose the student body offering the highest quality educational opportunities to all students. For in this situation no one group, majority or minority, is being preferred to any other. The objective of improving the education of all is

non-discriminatory in every sense of the word. Each special characteristic carries value as a contributor to the diversity of the whole.[5]

Counsel for the Anti-Defamation League of B'nai B'rith argue (Brief as *Amicus Curiae* at 24) that counting minority status as a factor favoring admission is "invidious" and "stigmatizing" to the students admitted because they suffer from the "uncommunicated realization that perhaps we were not authentic law students and the uneasy suspicion that our classmates [and certain members of the faculty] knew that we were not . . . ." This problem of the black student and students from other disadvantaged minorities is very real (see Cox Commission Report, Crisis at Columbia, 15-16 (New York, 1968)), but it arises from past racial injustices which have built a variety of inequalities into the whole structure of our society. To say that the individual black students, who are admitted to law school because of the weight given to their special background, outlook and talents and who may carry with them handicaps to high intellectual performance imposed from the past, are the victims of current stigmatizing and invidious treatment by the law school admitting them, flies in the fact of reality. First, the admitting law school does not create the feared intellectual handicaps. Second, the true comparison is not between attending law school with possible intellectual handicaps and without, but between attending with the possible handicaps and not attending at all. Third, all the law school does is to open an educational opportunity to the minority student which would otherwise be closed; the choice is the student's. Fourth, exclusive reliance upon

[5] The risk that "diversity" will be used as a cloak for reducing the numbers of any identifiable minority is small. Should statistical evidence show a pattern of decrease, the burden might fall upon the institution to rebut an inference of "hostile" and therefore unconstitutional discrimination.

tests of "intellectual competency and capacity" would long postpone eliminating the disadvantages in access to higher educational and career opportunities imposed upon minority groups by long years of society's hostile discrimination. Counsel offer in response only their pleasant but unproved (and we think utterly false) supposition that more vigorous recruitment would produce many applicants of higher intellectual attainment. (See Brief of American Jewish Congress as *Amicus Curiae* at 6.)

On the side of petitioners, it is also argued that giving favorable weight to minority status means that in the competition for the final place in an entering class members of the white race are put at a disadvantage because they may be passed over in favor of a black applicant whose other claims to selection are no greater than theirs; and imposing such a disadvantage in the comparison of A with B is said to be "invidious." The answer, we submit, is twofold: First, the comparison should not be perceived, and in truth is not made, in terms of race or color as such, but in terms of contribution to the richness and diversity of the contributions A and B respectively can make to the education of all students. Second, the risk that A will nonetheless perceive the distinction as mark of official bias towards the black race is too small to warrant subordinating the values promoted by allowing educational authorities thus to pursue non-discriminatory educational objectives.

In this connection, it is relevant to note that our submission does not require a ruling upon the constitutionality of fixed numerical target-quotas. In seeking rich and stimulating diversity in a class of limited size some attention to numbers is necessary, as pointed out above (pp. 16-17, *supra*). Students too few in number to be adequately representative of their background will not produce effective diversity whether they be from mid-western farmlands

or urban areas. Too small numbers may also create a harmful sense of isolation. Such attention to numbers carries very different connotations from fixed minority target-quotas. The latter assert absolute concern for race, color or ethnic origin as such, without regard to other forms of diversity. Under a target-quota system, a black applicant, a chicano and a native American Indian, for example, will each be admitted to fill the appropriate minority quota without looking to see what background, experiences, outlook and interests he is likely to bring to the class, and without comparing his probable total contribution with the probable total contribution of non-minority applicants competing for a place.

The foregoing considerations, separately and in combination, amply demonstrate that attention to minority status in selecting a class from among many qualified applicants for a limited number of places involves no "hostile" nor "invidious" discrimination. For this reason attention to minority status as one among many sources or indicia of diversity need not be justified by proof that it is necessary to serve a "compelling public interest." The "compelling interest" test applies only to hostile or invidious discrimination, or to discrimination in relation to fundamental rights. The latter branch of the rule is irrelevant because no one suggests that selection in the competition for a limited number of places in a law school is a "fundamental right." Cf. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 29-39 (1973). The occasional expressions concerning application of the compelling interest test to classifications, such as race, color or alienage, which are "inherently suspect" or "immediately suspect" should not be lifted out of context. *E.g., Frontiero* v. *Richardson,* 411 U.S. 677, 682 (1973); *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944)). All involved hostile or invidious discrimination. In *Frontiero* v. *Richardson,* for example, the opinion

announcing the judgment of the Court makes plain that its conclusions stem from a history of discrimination *against* women based on assumptions of female inferiority. 411 U.S. at 684-687. *Loving* v. *Virginia*, 388 U.S. 1 (1967) struck down "measures designed to maintain White Supremacy" (388 U.S. at 11). In *McLaughlin* v. *Florida*, 379 U.S. 184 (1964) the State law involved " 'as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment' " (379 U.S. at 194, quoting *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)). *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) condemned for the District of Columbia what *Brown* v. *Board of Education*, 347 U.S. 483 (1954) called "state-imposed discriminations against the Negro race" (347 U.S. at 490). The *Bolling* opinion itself spoke of " 'discrimination . . . *against* any citizen because of his race' " (347 U.S. at 499, quoting *Gibson* v. *Mississippi*, 162 U.S. 565, 591 (1896)) (emphasis supplied). *Graham* v. *Richardson*, 403 U.S. 365 (1971) found that "[a]liens as a class are a prime example of a 'discrete and insular' minority (see *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938)) for whom . . . heightened judicial solicitude is appropriate" (403 U.S. at 372). *Oyama* v. *California*, 332 U.S. 633 (1948), involved a statute which "singles out aliens of Japanese ancestry" for hostile treatment (concurring opinion of Black, J., 332 U.S. at 647). *Korematsu* v. *United States*, 323 U.S. 214 (1944), held that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" (323 U.S. at 216). *Hirabayashi* v. *United States*, 320 U.S. 81 (1943), also dealt with legislation directed against a minority group. Thus, the "inherently suspect" classifications have uniformly involved that invidious discrimination which "is a hostile and oppressive discrimination against particular persons and classes" (*Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940)).

The goal of improving the education of all students is plainly a permissible objective and attention to race is a well thought-out, even if debatable, method of improvement. Since the attention paid to race in seeking students of diverse backgrounds is not "invidious," the choice of the goal and method of achieving it are within the constitutional range of educational discretion. See pp. 27-30, *supra*.

The result should be the same even if every non-invidious official cognizance of race requires compelling justification. Seriously seeking to improve the non-discriminatory opportunities of all students is a compelling purpose. To require proof that promoting diversity is essential to improving education or that adequate diversity cannot otherwise be obtained, would impermissibly substitute judicial control for the seriously-considered, impartial and reasoned judgment of the educational authorities in whom the responsibility is vested.

II

THE EQUAL PROTECTION CLAUSE DOES NOT DENY STATE EDUCATIONAL AUTHORITIES THE DISCRETION TO GIVE FAVORABLE WEIGHT TO RACE, AMONG OTHER CRITERIA, AS A MEANS OF SECURING FOR DISADVANTAGED MINORITIES A MORE EQUITABLE DISTRIBUTION OF EDUCATIONAL OPPORTUNITIES AND PROFESSIONAL SERVICES.

A. Giving Favorable Weight to Minority Status in Selecting Qualified Students for Admission Is an Important Method of Reducing the Disadvantages Suffered by Minorities in Educational Opportunity and Professional Services.

Definition of community needs and choice of emphasis in filling them is a central aspect of educational policy-making at any institution of higher learning, whether privately-endowed or a State institution. One medical school may

specialize in research and produce new generations of researchers and teachers in medicine; another school might seek principally to provide general practitioners for rural communities. A school of education may be content to graduate the most intelligent and cultivated teachers even though nearly all gravitate towards well-paying positions in wealthy surburban school districts; another may conceive the major part of its educational mission to be the provision of more effective teachers for rural schools, or for the primary grades, or for high schools, or for schools in urban ghettos. More often than not the choice of policy calls for special emphasis rather than total concentration. It is hard to imagine one law school devoting all its energies to training trial lawyers while another graduates specialists in the law of corporations and finance, but it is easy to visualize a faculty choosing to put special emphasis upon either. Furthermore, selective emphasis is often put upon particular objectives in undertaking specially oriented programs financed by State or federal government or a foundation.

An institution's criteria for selection of qualified students for an entering class or a particular program may be deeply influenced by its objectives. A medical school emphasizing the training of general practitioners may look for different qualities than one primarily concerned with higher levels of teaching and research. A school of education worried by the quality of teaching in the blighted areas of urban centers will hardly make its selections by the same criteria as one primarily concerned with educational administration.

In recent years many institutions of higher education have become gravely concerned about the disadvantages suffered by minority groups in access to higher education,

business and professional opportunities, and professional services. Many kinds of obstacles face members of minority groups who might otherwise enjoy higher education: sheer prejudice, cultural barriers, language barriers, inferior schooling, economic obstacles, alienation and isolation, lack of incentives, *et cetera*. Many of the obstacles are the direct or indirect consequences of slavery, "white supremacy" and other historic prejudices leading to the poverty and isolation of disadvantaged groups. The barriers to entry into professional schools are also obstacles to entry into the professions. The lack of representative numbers of minorities in the professions not only deters successive generations of young men and women in minority groups from seeking higher education; it also narrows the membership and therefore the vision of the professions, and the availability of professional services. The obstacles at one level sustain and intensify the difficulties at another. Few barriers have been absolute, but it is beyond dispute that American life has put blacks, chicanos, Puerto Ricans, American Indians and, at some times and some places, other minorities at a severe disadvantage in opportunities for higher education, professional and executive careers, and the enjoyment of professional services.

The posture of the legal profession illustrates these generalities. In 1940 there were only about 1,425 black lawyers in the United States. By 1960, the number had doubled but they were still only 1 percent of all lawyers.[4] By 1968 the percentage had not significantly changed. Whereas one American in 625 became a lawyer, only one black American in 7,100 entered the legal profession.[5]

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[4] Leonard, *The Development of the Black Bar*, 407 Annals (May 1973) 134, 140.

[5] E. Gellhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069, 1073.

Similarly, in 1965 there were only 700 black law students, almost half of whom attended five predominantly black law schools. Black student enrollment was about 1.3 percent of total enrollment, and in the 145 non-black law schools, well below 1 percent.[6] There has been substantial increase within the last six years, but black, chicano and American Indian percentages of total enrollment are still less than half of their respective percentages of the United States population as a whole.[7] These differences cannot be explained as merely a statistical quirk. See *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967), aff'd *sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969). The barriers previously discussed have been formidable; though lessened perhaps today, they continue to be real.

The benefits of removing those obstacles and hence increasing opportunities for disadvantaged minorities in the law schools and later at the bar fall under four headings: (1) increasing the individual's opportunities for challenge, satisfaction and advancement, (2) broadening the membership and therefore the understanding of the legal profes-

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[6] 1965 *Proceedings of the Association of American Law Schools* 112.

[7] *United States Bureau of the Census, Persons of Spanish Origin in the United States: March 1972 and 1971*, 1; *United States Bureau of the Census, General Population, Statistical Summary Report*, 1970, Table 48.

Law school enrollment for several minority groups in the past few academic years, including the present, is as follows:

Year	*Total Law Students*	*Black Americans*	*Chicanos (Mexican-Americans)*	*American Indians*
1969-70	68,386	2,128	412	72
1970-71	82,479	Not available	Not available	Not available
1971-72	94,468	3,744	833	140
1972-73	101,707	4,423	1,072	173
1973-74	106,102	4,817	1,259	222

(Association of American Law Schools, *1973 Survey of Minority Groups in Legal Education.*)

sion, (3) improving the access of minorities to understanding practitioners, and (4) improving legal education.

The United States prides itself as a Nation in providing open opportunity for success and satisfaction to all of its citizens. Law can be a wonderfully exciting and rewarding profession. Its challenge to human understanding and intellectual discipline is enormous. Its perquisites are often large both in terms of material wealth and social esteem. There is no reason to believe that, all other things being equal, minority members of society would wish any less than others to strive for and attain the status of attorney-at-law. Indeed, there were ten applicants for every one opening in the Council on Legal Education Opportunity (CLEO) program in the summer of 1973.[9]

Surely, as membership in the legal profession becomes broader, so does its perspective. Collegial discussions and interactions with those who have first-hand knowledge of community and societal problems adds to the comprehension of the profession as a whole. Moreover, as membership becomes broader, understanding of the legal profession by larger segments of the population is also enhanced. What was heretofore only television knowledge is replaced by contact with friends and acquaintances who are lawyers in the same community. They may become role models for aspiring young men and women who had not previously appreciated their opportunities to practice law. Similarly, those once reluctant to seek legal advice may become less inhibited when they have access to attorneys with whom they are familiar, either personally or by reputation, within

[9] 18 American Bar News, No. 10, October 1973. For the past several years CLEO has sponsored summer programs at various law schools to help prepare minority college students for the study of law. The large number of applicants for the 214 places in the 1973 programs is but one illustration of the desire of many minority students to enter the legal profession.

their own community. This is not to say that only a black attorney can represent a black client or that a chicano must be represented by another Mexican-American. But it is myopic to believe that there is no difference in seeking representation from a person with whom one can identify as opposed to an "outsider."

We have discussed at length the ways in which diversity among undergraduates can add to the educational process. Law is an intellectual profession, but the law's concern is men and women, their daily lives, their joys and sorrows, their fears and aspirations, their mean pursuits and high adventures. Without sympathetic understanding of life, perhaps without understanding the persons with whom he deals better than they understand themselves, a lawyer is scarcely worthy of the name. Diversity of experience, background, outlook and interests among law students matriculating together contributes to that understanding for all students, and may be indispensable for many. Although the interchange of ideas among very bright students who are all from similar backgrounds is usually intelligent, it may be so one-dimensional as to be more filling than fruitful. One has only to contrast an imaginary discussion of the present case in a diversified class with the likely course of discussion in a homogeneous class of any single race and socio-economic status. Where the social ideas are as important as formal logic, diversity is a nutrient of intellectual growth.

The learning process also suffers if pluralism is limited to the students. See *Bradley* v. *School Board*, 382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965), *Porcelli* v. *Titus*, 302 F. Supp. 726 (D.N.J. 1969), 431 F. 2d 1254 (3d. Cir. 1970), cert. den. 402 U.S. 944 (1971). As members of minority groups have gained the opportunity for gradu-

ate and professional education, increased numbers have remained in the academic sphere. For example, between 1947 and 1969, as the number of black doctorates increased from 381 to 2,280, the number of black faculty at white schools also multiplied approximately seven times.[9] The first full-time black law school faculty member to serve at a predominantly white law school was William R. Ming, who taught at the University of Chicago from 1946 to 1950. In 1963, only four blacks had held full-time faculty positions in white law schools. Today, approximately one hundred black faculty members teach at the 148 accredited law schools, with about fifty of them at predominantly white law schools.[10]

Law schools have attacked the obstacles to minorities' access to legal education in many different ways. Active programs of recruitment are one; special courses aimed at lessening educational or cultural disadvantages are another; better appreciation of the causes of modest scores on admissions tests is a third. As illustrated by the present case, many law schools have modified their admissions programs, either procedurally or substantively or in both respects, in order to facilitate the admission of more students from minority groups.[11]

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[9] Rafky, *The Black Academic in the Marketplace*, Change (Fall, 1971) 6, 66.

[10] Parker and Stutzman, *Legal Education for Blacks*, 407 Annals (May 1973) 144, 152.

[11] See Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria*, 1970 U. Tol. L. Rev. 321; O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U. Tol. L. Rev. 281.

Professor Summers in *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. Tol. L. Rev. 377, argues that such admissions policies do not significantly increase the total number of minority students able to obtain a legal education but instead merely shift the minority student up to better schools. Crucial to his thesis is the assertion that

Procedurally, law schools have processed minority applications in a variety of ways, just as there have been differences from school to school in the processing of non-minority applications. In some schools a minority admissions officer may review all minority applications before they are discussed by the full admissions committee. In others, like the University of Washington, separate subcommittees first consider the applications; frequently these subcommittees include a member of a minority group. Two common characteristics seem to be present in most procedures. First minority admissions officer is generally involved in reading all minority applications in order to bring to the admissions process a better understanding of the strengths and weaknesses of minority applicants. The presence of a minority admissions officer provides credibility for the process; this is extremely important when a previously all-white institution is trying to show that there are genuine opportunities for minority students. Minority admissions officers, therefore, are not a sign of preference. Second, final admissions decisions are generally made by the full committee, as in the case of the University of Washington. This step tends to make certain that all candidates who are accepted meet the academic standards of the institution and have other characteristics that demonstrate they deserve admission. Review by the full committee provides also an implicit comparison of minority and non-minority candidates even if a favorable recommendation has come from a separate subcommittee.

"[a]lthough entry into law schools at the upper end of the scale is extremely restrictive, admission into schools at the lower end of the scale is quite open." At 382. To whatever degree that might have been true in 1970, it is certainly not true in 1974. With over 100,000 applicants for 37,000 first year places, the days of open admission to law schools are gone. ABA, *Legal Education and Bar Admission Statistics, 1963-1973*. See also *Prelaw Handbook 1973-1974*, Association of American Law Schools and American Bar Association, *passim*.

Substantively, the criteria for admissions have been changed to take account of minority status, but the changes vary widely from institution to institution, and even within a single university such as Harvard. Changes may be limited to weighing standardized test scores differently for minority candidates than for the generality of applicants. An American Indian student who has lived all his life on a reservation and has not had the opportunity to attend the best schools may not score as well on the LSAT as his white contemporary even though he has the same promise of high academic performance. Formerly, he might have been rejected on academic grounds because there was no recognition of the reason for his poor test performance and no consideration of the contribution he could make by reason of his cultural background. Today these factors are taken into account. In the same manner, some professional and graduate schools may be willing to look less carefully at initial grades earned by minority students in predominantly white colleges on the assumption that adjusting to the new academic environment may, at first, be more difficult for them than for the majority of students. Other schools may feel that this adjustment factor pervades all four years of college education and that a minority student cannot be held to the same grade performance as a white student, not because he or she may be incapable of doing fine work but because minority status itself may bring pressures to bear that are not applicable to white students.

In addition, minority applications may be scrutinized much more carefully today by some schools to find nonnumerical qualities that predict academic and professional success. A moving and incisive personal statement, a lengthy letter of recommendation from a professor explaining the student's struggles with concepts that, although

familiar to most students, may be foreign to a Philippino-American or a barrio chicano, a letter from a family friend describing the applicant's childhood — all these non-mechanical credentials may outweigh or at least help to balance the numerical predictors. Thus, the University of Washington Law School sought to insure that initially all minority applications would be carefully reviewed by those whose own experience was relevant to the evaluation of the qualifications of these applicants. Accordingly, minority candidates whose mechanical credentials were lower than those of applicants from the majority culture, but whose entire record showed the Admissions Committee special promise, were admitted to the law school.

Some institutions feel that the best method of sharply increasing minority participation in the educational process is to set fixed and specific goals of minority representation, *i.e.*, target-quotas, which are designed to include rather than exclude. Although petitioners and *amici* make much of the assertion that any quota excludes if the total number of admitted persons is fixed, there is an important psychological difference between a target whose purpose is to bring minority representation up, with the consequence of bringing majority representation down, and a ceiling quota, large or small, which is intended to limit the number of applicants admitted from any identifiable group or groups. There is an even more important difference between fixing a specific target-quota for every minority group and giving weight to membership in a generally-disadvantaged minority. Some institutions follow one course and others the other. The record shows that the University of Washington is in the latter class. (St. 416, 420) Giving such favorable weight is often coupled, as it was at the University of Washington, with rough estimates of what would be "reasonable representation in the classes of persons from cer-

tain minority racial and ethnic groups . . . " but no specific number would be fixed and the estimate would yield if it could not be achieved without sacrifice of otherwise sound academic practice or clear injustice to competing applicants without the asset of minority status. (St. 416, 420)

All of these steps are indubitably means of implementing educators' decisions that among their objectives should be reducing and if possible eliminating the disadvantages suffered by minorities in access to legal education. They vary in pace and cadence. Some may indeed be wiser or more effective than others. But in whatever form, they are being taken now not by merely a few educators but by thousands of colleges and universities in the United States.[12]

B. The Equal Protection Clause Does Not Deny to Educational Authorities Discretion to Seek to Reduce the Disadvantages Suffered by Minority Groups in Access to Educational and Professional Opportunities and to Broaden the Legal Profession by Giving Favorable Weight to Minority Status in Making Selections Among Qualified Candidates for Admission.

Earlier in this brief we explained our reasons for concluding that the Equal Protection Clause does not deny educational authorities discretion to elect to give favorable weight to membership in a minority race, among other criteria, in selecting an entering class from a larger number of qualified candidates where they conclude that giving such weight will increase the diversity of the student body and thus improve the quality of the educational opportunities offered to all students. See pp. 19-33, *supra*. The legal analysis supporting that proposition is different in two

[12] See Educational Testing Service, *Graduate and Professional School Opportunities for Minority Students, 1973-74.*

respects from that required to support giving weight to race, or membership in another minority, as a way of reducing existing disadvantages in access to educational opportunities, career opportunities and sympathetic professional services. First, the objective of improving the quality of education for all students can fairly be called "non-discriminatory" in every sense of the word. Second, if there is anything "invidious" about looking to race or other minority status as a factor favoring inclusion in an entering class, the sting is minimal where such status is counted as an indication of some actual and more potential diversity in talents, background, outlook or interests (which are then examined further in each individual case) and weighted along with the many other personal attributes of all the qualified applicants. In contrast, the objective of reducing the existing disadvantages of minority groups is a racially-, religiously-, or ethnically-conscious objective, and minority status as such becomes a factor favoring admission.

Despite these distinctions, the result in the latter case should be the same as in the former. The Equal Protection Clause does not prohibit all racially-conscious government activity, but only that which is "hostile" or "invidious" towards minorities or else falls under the general constitutional ban upon arbitrary or capricious classifications. See pp. 31-32, *supra*. Giving an advantage in admissions to members of a minority long subject to invidious discrimination and stigma of inferiority imposed by the dominant groups is neither "hostile" nor "invidious." See pp. 27-30, *supra*.

Nor does giving such weight offend the general ban upon arbitrary and capricious classifications. Comparisons, selections and discrimination in the sense that some are

admitted and others excluded is inescapable unless the school is enlarged. Giving favorable weight to disadvantaged-minority status in making selections among qualified applicants for admission results in the exclusion of a number of white students who give less promise of superior law school grades than the white students actually admitted but give somewhat more promise than the minority students put ahead of them because of the asset of minority status. The decision to give such weight to minority status expresses a judgment that the public and private interests served by using only criteria measuring "intellectual competency and capacity" and admitting the former group are less important than the interests in removing the obstacles clogging the access of disadvantaged minorities to educational opportunities and professional careers, in bringing into education more of the rich diversity of life in the United States, and in broadening the membership and vision of the legal profession and its capacity to give all segments of society understanding legal services. The right of the State to pursue these objectives is independent of any inquiry into how far the existing disadvantages stem from past violations of the Equal Protection Clause rather than private discrimination. Plainly, the balance struck is neither arbitrary nor capricious; and the giving of weight to minority status in the process of admissions is reasonably adapted to the objectives.

Even if the "compelling interest" test be applied on the theory that any distinction along lines of race, color, language or ethnicity is "suspect," the decision below should be affirmed. Petitioners and the *amici* aligned with them cannot seriously question the disadvantages under which blacks, chicanos, and American Indians suffer in access to higher education and career opportunities and in the availability of understanding legal services. Nor do they deny

that the bench and bar would benefit from the addition of qualified members of these groups. These objectives plainly rise to whatever level of importance the term "compelling" imports. The opposing argument therefore reduces either to claims that the chosen method is not the best or to the contention that no distinction drawn along lines of race, color, language, or ethnic or national origin is ever constitutional.

We doubt whether the "compelling interest" test is intended to open the relative merit of different approaches to judicial determination, but even in the framework chosen by petitioners and supporting *amici*, the arguments are unpersuasive. They offer no convincing evidence that by more vigorous recruitment the numbers of minority law students and minority lawyers can be increased substantially within a reasonable time. The low numbers of the past and even the present are themselves deterrents to seeking higher education and a professional career. Nor is it persuasive to show that a good proportion of black law school graduates have entered law firms with predominantly corporate and financial clients. The phenomenon is probably a short-run consequence of the still-small numbers of black law students and the firms' efforts to open the same opportunities to young lawyers from minority groups as are available to others. Even if the number of black lawyers serving black clients did not increase, their presence at the bar, in the classroom and on the bench would help to demonstrate that the legal system is not managed exclusively by any portion of society. Their presence would also broaden the understanding of all lawyers and dissipate the fear that members of a profession substantially closed to minorities can rarely be expected to provide understanding and sympathetic representation.

Since petitioners cannot complain of the balance struck by the State in terms of either the "rational basis" or "compelling interest" test, their only alternative is to assert categorically that a State violates the Equal Protection Clause by drawing *any* distinctions along lines of race, language or ethnic or national origin, even in an area where rather fine distinctions based upon other personal characteristics are unavoidable (given limits on the available resources). Acceptance of this proposition would deprive government of power to address itself to the disadvantaged condition of such minorities except by euphemism or indirection.

The catastrophic consequences are evident without looking beyond the field of education. If minority status must be ignored in admissions, it must be ignored in awarding financial aid. Special programs concentrated upon overcoming obstacles to minorities' enjoyment of educational and career opportunities would be invalid. The Harvard School of Education has a special program, funded by three federal agencies, to train American Indians for positions of leadership in education. The U.S. Department of Health, Education and Welfare grants funds for a program at the Harvard Summer School to help prepare students for careers in medicine. The project grant states that the trainees are to be disadvantaged ethnic minorities.[13] The Council on Legal Education Opportunity, an organization primarily funded by the federal government, supports summer programs and provides scholarships for minority students at Harvard and other law schools. Only minority students are involved. Similar programs have been established at State Colleges and Universities all over the

[13] The program is now under review to determine whether as a matter of policy it should be opened to other disadvantaged groups.

country. It is hard to see how any of them can be constitutional if petitioners' core proposition is sustained. Indeed, one would suppose that even the special efforts at recruitment of applicants from disadvantaged minorities which some *amici* in support of petitioners advocate would be unconstitutional if anyone had standing to challenge them, for they too would be "suspect" because they operated along racial, ethnic or linguistic lines.

It does not suffice to answer that this case deals with law school admissions: Petitioners and the *amici* supporting them are not arguing merely that it is arbitrary and capricious, on balance, to subordinate the interest in the admission of more students to law school on the basis of superior "intellectual competency and capacity" to the interest in decreasing not only the obstacles which the past has imposed upon minorities in access to legal education and professional careers but also the inequities in the availability of legal services. Striking such a balance is surely not unreasonable. Nor can petitioners and *amici* fairly assert that the latter interests are not sufficiently "compelling" to warrant subordinating petitioner's interest in admission to law school although they might be "compelling" enough to permit distinctions along racial lines in other connections. Admission to law school on the basis of "intellectual competency and capacity" is not a fundamental right. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 29-39 (1973). The very reason for confining the list of fundamental rights is to curtail judicial balancing of competing individual and social objectives where the function is properly one for responsible State officials. Petitioners' only conceivable basis for invoking the "compelling interest" test is the use of race or color as a basis of distinction. If the public interests served by reducing the disadvantages we have noted will not justify the racially-conscious dis-

tinction here, they will not justify any other racially-conscious distinction.

We are not unmindful of the fear that permitting consciousness of race to influence decisions to admit minorities now generally perceived as "disadvantaged" not only reduces the opportunities of all others but *could* become the occasion for throwing the whole burden of the reduction upon other minorities not now seen as disadvantaged. Nothing in the decision below or our argument suggests that any form of racial, ethnic or religious characteristic may be given the slightest weight in excluding any applicant who would otherwise be admitted. Such use perhaps could not always be proved, but that would be true regardless of the ruling in this case. The risk of the revival of such prejudice would not be enhanced by affirmance of the State court's decision.

Finally, we submit that three limitations upon the scope of any decision upholding the respondent's measures favoring the *inclusion* of members of minority groups are inherent in the situation.

First, the inequalities of opportunity which respondents are seeking to correct are plain beyond dispute. Consequently there is no need to consider whether abstractly similar measures would be unconstitutional in an era unmarked by the consequences of earlier, private and official, invidious discrimination.

Second, except for occasional references to special programs, our remarks are addressed to situations in which the favorable weight given to minority status does not bring the ratio of minority students in the whole class above the ratio of the minority group in the whole population from which all applicants are chosen. As we understand

the record, this is the case at the University of Washington Law School because it seeks students from all over the United States and the ratio of minority students admitted to all students admitted is not greater than the ratio of the same minorities to the whole population. Consequently, there is no need to consider when or whether special programs (such as those funded by CLEO) may be confined to minority students, or whether their status may ever be treated as an asset in filling a larger proportion of an entering class than the proportion of the minority to which they belong.

Third, we do not view the instant case as requiring a decision upon the constitutionality of fixed racial, ethnic, linguistic or national quotas. If any weight is to be given to minority status as a factor favoring admission, some sense of the amount of weight is probably required whether it be articulated or left to the individual judgment of each member of the admissions committee. The weight may be simply an "edge" in otherwise doubtful cases. At the other extreme, enough weight might be given to produce a specific, fixed number of students from specified minority groups. Middle courses treat as determinants a rough sense of:— (1) the number of capable students from any particular minority the institution had already admitted or might expect to admit in the particular year, (2) the degree of loss to the individual applicant and the institution attendant upon his degree of lower predicted grade average, (3) the extent to which other indicia of ability could appropriately be counted as counterpoints to somewhat lower but adequate predictions of law school grades, and (4) the strength of the qualifications of the applicants the particular minority applicant or applicants would displace. Petitioners have failed to prove that respondents' practice does not fall somewhere in this middle ground.

From a constitutional standpoint, the differences between giving favorable but undefined weight to minority status and fixing a specific numerical target for the admission of at-least-minimally-qualified minority applicants may not be significant. But the differences are so important in terms of educational philosophy and fairness among individuals as to lead us to suggest that the question should be reserved. Even in an age seeking only to reduce the disadvantages which minority groups generally suffer as the ingrained consequences of earlier hostile official and private discrimination, the allocation of a fixed target-quota of places proportionate to the ratio of the minority in the population seems to assert a group entitlement based solely upon numbers. Fixed target-quotas for each minority close places to individual members of different groups regardless of any number or degree of relevant qualifications. They impart a quite different philosophy than a teaching that in the competition for a limited number of places some adjustment must be made for social objectives but they are to be weighed in individual cases along with other claims to the places available. Whether the differences have constitutional significance it is unnecessary now to decide.

In *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 42 (1973) the Court observed that "education . . . presents a myriad of 'intractable economic, social, and even philosophical problems.' " Few are as insoluble as the problem of selecting those students for admission who will do most to enhance the quality of education available to them all. None is as intractable as the problems of relieving the deeply-ingrained obstacles that history has put in the way of minorities' enjoyment of access to higher education and the opportunities to which it leads. Quite possibly the long-

run costs to the educational system of even the seemingly-modest departures from the traditional tests of "intellectual competency and capacity" at issue in this case will prove much heavier than their advocates suppose. Quite possibly the traditional notions of "intellectual competency and capacity" will be found to ignore important dimensions of human experience and understanding, urgently requiring the attention of educational institutions. Quite possibly the debate is less important than it seems, and variety of approaches will be the ideal solution so long as the "inequalities" persist. We do not advocate any one view. No one view is uniformly pursued at Harvard University. The important point is that the debate and experimentation be allowed to proceed at all institutions of higher education, whether state or privately-endowed, rather than shut off by a novel constitutional limitation on the discretion of educational authorities.

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

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